STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

DRAFT BOARD ORDER

IN THE MATTER OF

EVERGREEN WIND POWER II	) SITE LOCATION OF DEVELOPMENT ACT
MAINE GENLEAD LLC	) NATURAL RESOURCES PROTECTION ACT
Aroostook and Penobscot Counties	)
OAKFIELD WIND POWER	)
L-24572-24-C-N (denial of appeal)	) APPEAL
L-24572-TF-D-N (denial of appeal)	)
L-24572-IW-E-N (denial of appeal)	)
L-24572-24-F-N (denial of appeal)	)
L-24572-TF-G-N (denial of appeal)	) FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S.A. §§ 344 (2-A) and 341-D (4) and Chapter 2, § 24 (B) of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal and request for a public hearing of Protect our Lakes and Donna Davidge (collectively "appellants"), the material filed in support of the appeal, the response of the licensees, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

In Department Order #L-24572-24-A-N and L-24572-TF-B-N, dated January 12, 2010, the Department approved Site Location of Development Act (Site Law) and Natural Resources Protection Act (NRPA) permit applications for the construction of a 51-megawatt (MW) wind energy development, known as Oakfield Wind Project. The applicant for the original application was Evergreen Wind Power II, LLC. The approved development consisted of 34 wind turbines in 36 potential locations, with associated turbine pads, electrical collection infrastructure, an electrical interconnection substation, meteorological (met) towers, and an Operations & Maintenance (O & M) building, for a total of 45.1 acres of new impervious area and approximately 50 acres of new developed area. The NRPA permit approved impacts to wetlands and one significant vernal pool (SVP). These impacts included 2,440 square feet of fill in forested, scrub shrub, and emergent freshwater wetlands, and the clearing of 8,790 square feet of wetland vegetation for construction of the transmission lines. The project as originally proposed would have resulted in the alteration of upland habitat of one SVP, where the project crane road would be located within 200 feet of the SVP, leaving 82% of the critical terrestrial habitat undisturbed. The applicant also received a Permit by Rule (PBR #47798) for a stream crossing. The original proposal was appealed to the Board, which affirmed the Department's approval of the project, and subsequently to the Maine Supreme Judicial Court, which affirmed the Board's decision. This project was never constructed.

On June 10, 2011, the licensees submitted Site Law and NRPA applications, proposing the construction of a revised project on the site of the previously approved project and additional adjacent lands in the Towns of Oakfield, Chester, Woodville, Mattawamkeag, Molunkus Township, Macwahoc Plantation, North Yarmouth Academy Grant, Reed Plantation, Glenwood Plantation, T3R3 WELS, T4R3 WELS, and Linneus ("project"). The revised

applications propose the construction of 50 Vestas 3.0 MW turbines, increasing the number of turbines from 34 to 50 and the capacity of the project from 51 MW to 150 MW. The revised proposal includes a new substation and point of interconnection with the electrical grid which requires the construction of a 59-mile generator lead transmission line. The Department treated these applications as new because the licensees now propose a layout for the project that is entirely different than what the Board previously reviewed and approved.

The Department held a public meeting on August 3, 2011 in the Town of Oakfield. Prior to the start of the general public meeting, the Department met with individuals who had specific concerns.

The Department approved the applications on January 17, 2012. A timely appeal to the Board was filed on February 16, 2012 by the appellants listed above. On February 24, 2012 the licensees filed their response to the appeal. On March 6, 2012 the Town of Oakfield also submitted a response to the appeal.

2. AGGREIVED PERSONS:

Protect our Lakes ("POL") is a Maine non-profit corporation, organized for the purpose of educating the public about, and taking action against, this project. It is comprised of individual landowners and business owners in the towns of Oakfield, Island Falls and surrounding communities. There are members who own lakefront property or other non-lakefront property that will have views of at least some of the turbines. POL also includes business owners and managers who may be impacted by the project. Donna Davidge is the proprietor of the Sewall House Yoga Retreat in Island Falls, Maine. The Sewall House is on the National Register of Historic Properties, and Ms. Davidge utilizes lakefront locations on Mattawamkeag Lake for yoga exercises.

In its response to the appeal, the Town of Oakfield submitted argument and supplemental information to the record that questioned whether POL or Donna Davidge is an aggrieved person with standing. The Town claims that POL does not have any members (according to the articles of incorporation submitted by the Town as its Exhibit #3). The Town asserts that an organization only has standing when the "members would otherwise have standing to sue in their own right," and that therefore with no members the organization can have no standing. The Town further argues that even if the organization did have members it has not identified a member with aggrieved person status. The Town argues that Donna Davidge is not an aggrieved person because she has not demonstrated how she will suffer a particularized injury (harm that is traceable to the governmental action and also, in fact, a harm distinct to an individual as opposed to a harm posed to the general public).

POL and Ms. Davidge filed a response to the Town of Oakfield's standing challenge. POL asserts that, while its articles of incorporation correctly reflect that it has no voting members, it does indeed have members. POL states that, while its members have no decision-making power, as reflected in the articles of incorporation, it has individual members who support the goals of POL and who may or may not also make financial contributions to the non-profit. POL further states that it has supporting members who are aggrieved because they own

property with views of the proposed turbines and thus their use and enjoyment of those properties will be negatively impacted. Ms. Davidge asserts that she owns and operates a business that will be negatively impacted by the views of the proposed turbines from Mattawamkeag Lake.

The Board finds and concludes that POL's designation as a non-membership organization for the purpose of incorporating is not determinative of standing in this proceeding. Rather, POL has demonstrated that it has members, including Ms. Davidge, who own properties and business interests near the project area that will have views of the project's turbines, and therefore this licensing decision may cause injury to them in the form of negative visual impacts. Accordingly, the Board determines that POL, as an organization, and Ms. Davidge, individually, have demonstrated they are aggrieved persons for the purpose of this appeal, as defined in Chapter 2 § 1(B) of the Department's Rules Concerning the Processing of Applications and Other Administrative Matters.

3. BASIS FOR APPEAL:

The appellants assert that the Department erred in making the following findings:

A. Scenic Character: The proposed project will not have an unreasonable adverse effect on the scenic character of scenic resources of state or national significance or related existing uses;
B. Wildlife: The proposed project will not adversely impact birds and bats;
C. Wetland Impacts: The applicants have avoided and minimized wetland and waterbody impacts to the greatest extent practicable, and the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project; and
D. Financial Capacity: The applicants have demonstrated adequate financially capacity to comply with Department standards.

4. REMEDY REQUESTED:

The appellants request that the Board hold a public hearing and reverse the January 17, 2012 Department decision approving a permit for the construction of the Oakfield Wind Project in the Towns of Oakfield, Chester, Woodville, Mattawamkeag, Molunkus Township, Macwahoc Plantation, North Yarmouth Academy Grant, Reed Plantation, Glenwood Plantation, T3R3 WELS, T4R3 WELS, and Linneus.

5. REQUEST FOR A PUBLIC HEARING:

The appellants request that the Board conduct a public hearing on this appeal on the issues of wildlife and visual impacts. The appellants raise concerns regarding the procedural provisions of the Wind Energy Act (WEA), for example, noting that under the WEA the Board may not take original jurisdiction and hold public hearings, and therefore the Board, unlike the Land Use Regulatory Commission, has not held public hearings on wind power projects. The appellants also argue that there is "credible conflicting technical information regarding licensing criteria" in this case, and therefore a public hearing is warranted. At a hearing, the appellants propose to present direct and rebuttal testimony from ornithologist

Michael Good on wildlife issues and present rebuttal testimony from an unnamed independent visual impact specialist. Appellants did not, however, submit a summary of Michael Good's proposed testimony or the name and qualifications of the independent visual impact specialist as required by Chapter 2 § 24(B)(5) of the Department's Rules Concerning the Processing of Applications and Other Administrative Matters.

The permit applications were filed on June 10, 2011. The Department did not receive a request for a public hearing during the 20-day period specified for such requests in the Department's Chapter 2 rules governing the processing of applications.

In consideration of the level of public interest in wind power projects, the Department held a public meeting pursuant to 38 M.R.S.A. § 345-A (5). The purpose of this meeting was to provide interested persons and the general public with an opportunity to comment on the application and submit information into the Department's record. The Department held the public meeting on August 3, 2011 at the Oakfield Town Hall in the Town of Oakfield, Maine. Members of the public offered comments and asked questions at the meeting. The Department also received numerous letters and documents regarding specific aspects of the proposed project during the application review period.

The record reflects that during the 7-month period of the review of the applications, the appellants had the opportunity to present information and argument to the Department and availed themselves of that opportunity both at the public meeting and through the submission of information during the review process. The appellants' submissions included an email from United States Fish and Wildlife (USFWS) dated January 19, 2012 which is discussed in section 7 below. The appellants could have submitted evidence from an independent visual expert and from Michael Good on wildlife during the period of review of the applications by the Department.

The Department issued a draft order for public comment on January 6, 2012. The comment period on the draft order closed on January 13, 2012. The licensees, the appellants and other members of the public submitted comments on the draft order.

The Board has considered the information contained in the permitting record, the arguments of the appellants, and the licensees' response. Pursuant to 38 M.R.S.A. § 341-D (4) and the Department's regulations, holding a public hearing is discretionary. In this appeal the Board finds that the evidentiary record is well developed with regard to the statutory criteria. The appellants had the opportunity to submit evidence in response to the licensees' submittals with regard to visual impacts, wildlife impacts, wetland impacts, and financial capacity, and in response to the analysis by the Department's visual expert. The Board finds that a public hearing in this case is not warranted or necessary to assist the Board in understanding the presented evidence.

6. DISCUSSION AND FINDINGS PERTAINING TO VISUAL IMPACTS CLAIMS RAISED ON APPEAL:

The appellants assert that the Department erred in its finding that the project would not have an unreasonable adverse effect on the scenic character or existing uses related to scenic character based on the following contentions:

(A) The user survey is neither valid nor reliable;

(B) The Visual Impact Assessment (VIA) process currently used is inconsistent with the *Wildlife Lake Assessment* and *Maine's Finest Lakes Survey*.

The Wind Energy Act (WEA), 35-A M.R.S.A. § 3452 (1), provides in pertinent part that:

> In making findings regarding the effect of an expedited wind energy development on scenic character and existing uses related to scenic character pursuant to [the Site Law] or [the Natural Resources Protection Act,] the [Department] shall determine, in a manner provided in subsection 3, whether the development significantly compromises views from a scenic resource of state or national significance. Except as otherwise provided in subsection 2, determination that a wind energy development fits harmoniously into the existing natural environment in terms of potential effects on scenic character and existing uses related to scenic character is not required for approval under [the Site Law.]

Title 35-A § 3452 (3) provides in pertinent part that:

> In making its determination pursuant to subsection 1, and in determining whether an applicant for an expedited wind energy development must provide a visual impact assessment in accordance with subsection 4, the [Department] shall consider:
>
> (A) The significance of the potentially affected scenic resource of state or national significance;
>
> (B) The existing character of the surrounding area;
>
> (C) The expectations of the typical viewer;
>
> (D) The expedited wind energy development's purpose and the context of the proposed activity;
>
> (E) The extent, nature and duration of potentially affected public uses of the scenic resource of state or national significance and the potential effect of the generating facilities' presence on the public's continued use and enjoyment of the scenic resource of state or national significance; and
>
> (F) The scope and scale of the potential effect of views of the generating facilities on the scenic resource of state or national significance, including but not limited to issues related to the number and extent of turbines visible from the scenic resource of state or national significance, the distance from the scenic resource of state or national significance and the effect of prominent features of the development on the landscape.
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> A finding by the [Department] that the development's generating facilities are a highly visible feature in the landscape is not a solely sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance. In making its determination under subsection 1, the [Department] shall consider insignificant the effects of portions of the development's generating facilities located more than 8 miles, measured horizontally, from a scenic resource of state or

national significance.

Title 35-A § 3452 (4) provides in pertinent part that:

> An applicant for an expedited wind energy development shall provide the [Department] with a visual impact assessment of the development that addresses the evaluation criteria in subsection 3 if the [Department] determines such an assessment is necessary in accordance with subsection 3. There is a rebuttable presumption that a visual impact assessment is not required for those portions of the development's generating facilities that are located more than 3 miles, measured horizontally, from a scenic resource of state or national significance. The [Department] may require a visual impact assessment for portions of the development's generating facilities located more than 3 miles and up to 8 miles from a scenic resource of state or national significance if it finds there is substantial evidence that a visual impact assessment is needed to determine if there is the potential for significant adverse effects on the scenic resource of state or national significance…

The proposed project contains "generating facilities" including wind turbines and towers as defined by 35-A M.R.S.A. § 3451 (5) and "associated facilities" such as buildings, access roads, substations as defined by 35-A M.R.S.A. § 3451 (1). Therefore, the proposed project and its associated facilities must be reviewed pursuant to the expedited wind energy development standards outlined above and, to the extent applicable, 38 M.R.S.A. § 484 (3) and § 480-D (1). The Department elected under section 3452 (2) to review the generator lead line pursuant to the visual impact criteria of the Site Location of Development Act 38 M.R.S.A. § 484 (3).

The licensees submitted two visual impact assessments (VIA) for the proposed project prepared by Terrence J. DeWan and Associates (TJD&A). The first, entitled *Section 30: Visual Impacts of a Generation Facility,* focused on the potential impact of the generating facilities and associated facilities on scenic resources of state or national significance (SRSNS) within eight miles of the proposed project using the evaluation criteria presented in the Wind Energy Act. The second, entitled *Section 6: Visual Quality and Scenic Character,* evaluated the generator lead line, using the Department's traditional scenic assessment procedures. The licensees also submitted a user intercept survey addressing recreational users of Pleasant Lake and Mattawamkeag Lake, authored by Market Decisions and dated October 2011. In the application materials the licensees referenced and cited the results from a recreational user survey that had been conducted for the Bull Hill wind project in Hancock County and that surveyed users of Black Mountain and Donnell Pond.

In accordance with 35-A M.R.S.A. §§ 3452 (3) & (4), the Department required that the licensees conduct a visual impact assessment within a three-mile radius of the proposed project. Although not specifically required by the Department, the licensees extended the assessment to an eight mile radius. The licensees' visual impact assessment (VIA) identifies scenic resources of state or national significance (SRSNS) as defined pursuant to 35-A M.R.S.A. § 3451(9), it analyzes the potential impacts the project will have on scenic resources of state or national significance, and it provides visual simulations of the views

from those resources. The only SRSNSs with potential for views of the project were Pleasant Lake and Mattawamkeag Lake.

The Department hired an independent expert, James F. Palmer of Scenic Quality Consultants (SQC), to review the Scenic Character section of the application; to attend the Department's public meeting; to visit the site; to review information submitted by the interested persons and supplemental evidence submitted by the licensees; and to provide the Department with review comments.

A. User surveys submitted by the licensees

In the application materials, the licensees referred to and cited statistics from a recreational user survey that had been conducted for the Bull Hill Wind Project in Hancock County and had surveyed users of Black Mountain and Donnell Pond. The reference was to substantiate the statement that "[t]he project should have no unreasonable adverse effect on its scenic character or the uses related to scenic character of Pleasant Lake." The licensees subsequently submitted a recreational user survey of the users of Pleasant and Mattwamkeag Lakes, dated October 2011. The appellants argue that the recreational user survey completed for the Bull Hill project is not relevant to the Oakfield wind power project because the users surveyed engage in different recreational uses than users of Pleasant and Mattawamkeag Lakes. The appellants further argue that both the Black Mountain and Donnell Pond and Pleasant Lake and Mattawamkeag Lake recreational user surveys lacked reliability and validity, and failed to meet the standards of a scientifically designed survey instrument.

While not directly related to the present project the Board finds that it was appropriate for the Department to consider the reference to and findings from the Black Mountain and Donnell Pond recreational user survey as evidence of the opinions of recreational users of Maine's scenic natural areas in general. The Board recognizes that the Department did not make its finding regarding scenic character and existing uses related to scenic character based solely on this survey and that the licensees did conduct a recreational user survey of users in the project area to be reviewed with the other relevant visual impact materials submitted by the licensees.

The survey methods for both recreational user surveys were reviewed and approved by the Department's independent expert, SQC, which found the survey methods followed standard practice for recreational user surveys. The appellants raised concerns over reliability and validity of the recreational user surveys during review of the project, but SQC found that there was no evidence to support the assertion that the intercept surveys were invalid or unreliable. SQC found the initial Bull Hill survey had a group reliability of .987 for the Black Mountain responses and .952 for the Donnell Pond responses, which are very high, as noted in Finding 6 of the Department Order. The October 2011 Pleasant Lake and Mattawamkeag Lake recreational user survey interviewed people near the boat launches on Pleasant and Mattawamkeag Lakes. In the initial review of the October 2011 recreational user survey, SQC commented that the survey was "well constructed to address the Wind Energy Act's scenic criteria relating to the users of SRSNSs," as noted in Finding 6 of Department Order. SQC found the procedures used by this survey to be normal for an

intercept study. For example, the interviewers acted independently from the licensees, intercepted users near the public boat launches on both lakes, and interviewed only adults. Appellants have submitted no expert testimony to contradict the SQC comments. The Board finds that the Department properly relied on the comments of SQC.

The Board finds that the licensees' recreational user surveys submitted with the applications are relevant, valid, and reliable based on the evidence in the record. The Board further finds these surveys were used properly as one tool of many submissions used by the Department to determine the visual impacts of the proposed project. The Board finds that the Department properly relied on these surveys while reviewing potential visual impacts.

B. The *Wildlands Lake Assessment* and *Maine's Finest Lakes Survey*

The appellants argue that the visual impact of the project on Mattawamkeag Lake and Pleasant Lake should be judged by the degree to which the project will change the nature of these lakes and alter the factors that led to them being rated as Class 1-A and Class 1-B, respectively, in the *Wildlands Lake Assessment.* The appellants argue that the expanded project would be a rejection of the values expressed and implied in the *Wildlands Lake Assessment.*

The *Wildlands Lake Assessment* is a report presenting the findings of a study initiated by the Maine Land Use Regulation Commission (LURC) in order to make informed decisions regarding the protection and use of Maine's lake resources. In the *Wildlands Lake Assessment* both lakes are classified as having significant but not outstanding scenic resources. These ratings were based on LURC's *Scenic Lakes Character Evaluation in Maine's Unorganized Towns*. This evaluation rated lakes within the unorganized towns for their scenic quality using map analysis and field evaluation. Relevant to this appeal, the evaluation rated Mattawamkeag Lake as 30 out of 100 for Scenic Attributes, and Pleasant Lake was rated 20 out of 100. These ratings were based mostly on physical features (presence of cliffs or beaches), shore configuration, or special features. Both lakes had their ratings reduced for inharmonious development. The rating system rated lakes 1-A if they had two or more outstanding values and 1-B if the lakes had one single outstanding value. The ratings of 1-A for Mattawamkeag Lake and 1-B for Pleasant Lake are not based on a scenic value. Mattawamkeag Lake's Resource Class is due to outstanding ratings for fisheries and shoreline character. Pleasant Lake's Resource Class is due to an outstanding rating for fisheries. These resource characteristics should not be affected by the presence of turbines.

The appellants argue, however, that the Department has underestimated the value of the lakes' remoteness and the project's impact on that characteristic. Further, the appellants argue that the Department has underestimated the value of Mattawamkeag Lake in view of recent land acquisitions in the area by the Bureau of Parks and Lands (BPL). In its review of the project SQC commented that neither Pleasant nor Mattawamkeag Lakes would be considered remote because the lakes have road access, boat launches, and residential development, as noted in Finding 6 of Department Order. LURC designates lakes as

"remote" in its *Comprehensive Land Use Plan*, and neither lake is so designated. Moreover, remoteness is not an independent Wind Energy Act (WEA) evaluation criterion. As to the BPL purchases, none of the lands is defined under the WEA as a SRSNS, see 35-A M.R.S.A. § 3451(9). The BPL can choose to designate land as scenic viewpoints as defined under 35-A § 3491 (9)(F), and did not do so in this case. Pursuant to the criteria in the WEA the Board cannot consider scenic impacts to areas that are not designated SRSNS.

The appellants point out that the Department Order states that the scenic impacts from the "worst case" photo simulations could be controversial. The appellants argue that the turbines will be visible from approximately two-thirds of Mattawamkeag Lake and 90% of Pleasant Lake and that the visibility of the project from these lakes and the impact on recreational use of the lakes should have been found to be unreasonable. However, as also described in the Department Order, the "worst case" photo simulation is not the case for the majority of locations in both lakes but is restricted to a much smaller area. On Pleasant Lake the "worst case" simulations show locations with a view of +/- 25 turbine hubs plus a half a dozen blade tips; on Mattawamkeag Lake the "worst case" is a location with a view of +/- 30 turbines hubs plus five blade tips. While turbines will be visible from most of Pleasant Lake, a typical location would have about 10 turbines hubs visible. On Mattawamkeag Lake, there will be no visibility from almost all of the upper lake, and almost half of the lower lake. There are areas from which 25 to 30 turbines will be visible, but the closest of these turbines are 3.5 to 5 miles distant, and some will be more than 8 miles away. According to both the licensees' VIA and SQC's review, the scenic impact to Pleasant Lake was determined to be low tending toward medium and will not be an unreasonable adverse impact, the scenic impact to Upper Mattawamkeag Lake will be minimal to low, and the scenic impact on Lower Mattawamkeag Lake will be medium to high. In no case, did any scenic expert determine that the scenic impact would be unreasonably adverse.

As noted above, the WEA provides that, "A finding by the primary siting authority that the development's generating facilities are a highly visible feature in the landscape is not a solely sufficient basis for determination that an expedited wind energy project has an unreasonable adverse effect on the scenic character and existing uses related to scenic character of a scenic resource of state or national significance." Thus, while the proposed project may be clearly visible and such scenic impacts controversial, it does not necessarily follow that the impacts are unreasonable under the WEA. The Department's finding that the scenic impacts to these two lakes is not unreasonable was based on its review of the totality of the evidence submitted by the licensees and interested persons, including a VIA conducted by TJD&A, on the comments submitted by SQC, and on the Department's interpretation of the applicable laws.

The Board finds the licensees' submissions and analysis of potential visual impacts to the use of the pertinent resources to be an adequate assessment and a demonstration that the development will not significantly compromise the views from the pertinent resources. The Board also finds the review of the evidence and comments submitted on this issue by Scenic Quality Consultants to be credible. Therefore, based upon the evidence in the record, the Board finds that the licensees have adequately assessed the proposed project's potential visual impacts as set forth under the Wind Energy Act (WEA) and have demonstrated that the project will not significantly compromise views from a scenic resource of state or national

significance. The Board finds the Oakfield Wind Power project will not have an unreasonable adverse effect on the scenic character or existing uses related to scenic character of scenic resources of state or national significance.

7. DISCUSSION AND FINDINGS PERTAINING TO WILDLIFE ISSUES:

The appellants argue that the Department failed to address numerous defects in the licensees' submissions pertaining to wildlife issues.

A. Post-Construction Monitoring of Bat Mortality

The appellants argue that the Department failed to require the licensees to develop a bat mortality study in consultation with Maine Department of Inland Fisheries and Wildlife (MDIFW) Bat Conservation International, and the Bat and Energy Cooperative, and that this will result in the project having an adverse effect on bats.

In Comments on the applications dated November 15, 2011, MDIFW recommended that the Department require operational control measures, in the form of seasonal curtailment of the turbines, be established to minimize risk of mortality to bats. The MDIF&W commented to the Department that if the applicant did not agree to the recommended seasonal curtailment MDIFW recommended that the licensees develop a bat mortality study in consultation with MDIFW, BCI and the Bat and Energy Cooperative. The actual detailed study design would be reviewed by the Department prior to commencing turbine operation. The licensees and the Department came to an agreement to utilize operational control measures, as discussed in Finding 7 of the Department Order. The curtailment agreed to by the licensees and MDIFW is required from May 1 to September 30 when the wind speed is less than 5.0 meter/second (m/s); and only when the ambient temperature is above 50 degrees F from June 1 to August 31; and when above 32 degrees F in May and September. If at any point during this time period the wind speed increases to greater then 5.0 m/s the turbine blades will be free to rotate. The licensees are the first wind power project in Maine to agree to the seasonal curtailment to protect bats. This was the preferred method of protecting bats recommended to the Department by MDIFW. Based on the licensees' agreement to implement seasonal curtailment measures, and MDIFW's opinion that these measures would be adequate to protect bat populations, the Department did not require the specific bat mortality study referred to by the appellant. The licensees are, however, required to submit to the Department for its review and approval a post-construction monitoring plan for bat and bird mortality in Condition 26 of the Order.

The Board finds that the Department's approval of an operational curtailment plan in lieu of the referenced post-construction bat mortality study was reasonable, that the Department addressed potential impacts to bats in an appropriate manner, and that the project will not result in an adverse effect on bats.

B. Eagle Impacts

The appellants argue that the licensees did not adequately address the potential impacts the proposed project could have on bald eagles. The appellants point to a January 19, 2012 email in which United States Fish & Wildlife Service (USFWS) stated that there is an eagle nest within a mile of the closest turbine and argue that the Department should have considered this in its analysis and addressed it in the Department Order.

The licensees submitted surveys assessing the potential impacts of the project on bird populations. These surveys included aerial surveys for bald eagle nests, raptor migration surveys and eagle activity surveys. These surveys were prepared in consultation with MDIFW and the USFWS. The results were reviewed by both agencies.

Between 2009 and 2010 the licensees conducted aerial assessments of all lakes within three to four miles of proposed turbines to determine if there was eagle nesting activity. Of the area lakes searched, one bald eagle nest, three quarters of a mile north of the project area, was found to have some activity, as documented in Appendix 7-8 of the Eagle Summary Report submitted by the licensees and reviewed by the Department. This particular nest was active in 2009 and inactive in 2010. The licensees surveyed the proposed transmission line and found no nests in the project area. As discussed in the Department's order, the licensees did find one active nest within a mile of the generator lead line Penobscot River crossing, as documented in Appendix 7-4 of the 2010 Bald Eagle Aerial Flight Survey Memo submitted by the licensees.

It is true that the Department did not discuss the nest near the turbines in its Order but in consideration of the evidence in the record this cannot be read to infer that the Department's review of potential project impacts to eagles was inadequate. The nest was documented in the application and MDIFW reviewed all the surveys and information submitted by the licensees and did not note any concerns regarding eagles in their review comments. As explained by MDIFW, the existence of one nest over ¼ mile away from the turbines cannot be construed as presenting a significant adverse impact to bald eagles. The Department found that there were no adverse effects to bald eagles based on the MDIFW review comments and the information submitted in the applications.

The Board finds that the Department adequately addressed the issue of bald eagle impacts and properly concluded that the proposed project would not result in an adverse effect to Wildlife.

8. DISCUSSION AND FINDINGS PERTAINING TO WETLAND IMPACTS:

The appellants point out that the licensees noted "four known potential vernal pools" in the compensation area but failed to determine the status and level of biological significance as requested by MDIFW in comments. The appellants argue that the mitigation parcel may not be considered compensation for lost vernal pool values when the application did not address the status and level of biological significance of the pools in the compensation area.

The Department did not require the licensees to verify if the vernal pools were considered Significant Vernal Pools (SVPs), as defined by NRPA Chapter 335, because the licensees

were not required to compensate for any vernal pool impacts. The proposed project will not impact any vernal pool depressions. The impacts to vernal pool habitat will be minor in nature and all qualify for consideration under Permit-By-Rule (PBR) and would not require compensation. The licensees applied for and the Department approved three PBRs for impacts to vernal pool habitat which included activities that impacted less than 25% of the critical terrestrial habitat. These PBRs included one that will impact 3% of the habitat of a potentially SVP critical terrestrial habitat for the collector line right of way, one that will impact approximately 4% of a SVP critical terrestrial habitat for turbine pad clearing, and one for an access road that will impact 18% of a SVP critical terrestrial habitat.

The Board finds that the Department did not err in allowing the compensation parcel without requiring evidence of the level of significance of its vernal pools.

9. DISCUSSION AND FINDINGS PERTAINING TO FINANCIAL CAPACITY:

The appellants argue that the documents submitted by the licensees were not an adequate basis for a finding of financial capacity. These documents included Condensed Consolidated Balance Sheets (unaudited) for First Wind Holdings, LLC (the parent company of the licensees) and a letter from Michael Alvarez, the President and Chief Financial Officer of First Wind Holdings, LLC indicating First Wind Holdings, LLC's intent to develop and finance the project. The appellants additionally argued that the licensees have four pending wind projects in Maine and the Board should determine whether the licensees have financial capacity for all of these projects. The appellants contend that the licensees should submit an "intent to fund" statement from an appropriate funding institution.

The licensees submitted a letter of support to provide initial funding for the project from First Wind. The Department determined that the evidence submitted by the licensees in the applications was sufficient to find that the licensees had the financial capacity to develop "the project in a manner consistent with state environmental standards and the provisions of [the Site Law], 38 M.R.S.A. §484 (1)" provided that, as set forth in the Department's order, licensees submit evidence of final financing to the Department prior to the start of construction. In conjunction with that finding, the Department conditioned the permit such that, "[p]rior to the start of construction, the applicants shall submit evidence that they have secured final financing for the project in accordance with 38 MRSA §484(1) and Chapter 375(1), to the Department for review and approval."

The Board finds that the licensees have demonstrated adequate financial capacity to comply with Department standards provided that, as set forth in the Department's order, licensees submit evidence of final financing to the Department prior to the start of construction.

10. CONCLUSIONS:

Based on the above findings, the Board concludes that:

A. The appellants filed a timely appeal.

B. The Board denies the request for a public hearing on this appeal.

C. The licensees' proposal to construct a 150 MW wind energy development, known as the Oakfield Wind Project, in the Towns of Oakfield, Chester, Woodville, Mattawamkeag, Molunkus Township, Macwahoc Plantation, North Yarmouth Academy Grant, Reed Plantation, Glenwood Plantation, T3R3 WELS, T4R3 WELS, and Linneus meets the criteria for a permit pursuant to the Site Location of Development Act, 38 M.R.S.A. § 484, the Natural Resources Protection Act, 38 M.R.S.A §480-D, and the Wind Energy Act, 35-A M.R.S.A. §§ 3452-3455.

THEREFORE, the Board AFFIRMS the Department's approval of the permit applications filed by EVERGREEN WIND POWER II LLC AND MAINE GENLEAD LLC to construct a 150 MW wind energy development, known as the Oakfield Wind Project, in the Towns of Oakfield, Chester, Woodville, Mattawamkeag, Molunkus Township, Macwahoc Plantation, North Yarmouth Academy Grant, Reed Plantation, Glenwood Plantation, T3R3 WELS, T4R3 WELS, and Linneus, Maine, as described in Department Order L-24572-24-C-N through L-24572-TF-G-N. The Board DENIES the appeal of Protect Our Lakes and Donna Davidge.

DONE AND DATED AT AUGUSTA, MAINE, THIS_____ DAY OF _____, 2012.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Susan M. Lessard, Chair